

REMARKS

Applicant has carefully reviewed this Application in light of the Decision on Appeal (the "Decision") from the Board of Patent Appeals and Interferences (the "Board") mailed April 28, 2005. Applicant amends Claims 1, 10, 19, and 28 and respectfully requests reconsideration and favorable action in this case.

On appeal, the Board considered both a rejection under 35 U.S.C. § 102 based on U.S. Patent No. 5,546,379 issued to Thaweethai, et al ("*Thaweethai*") and a rejection under 35 U.S.C. § 103 based on *Thaweethai* in combination with U.S. Patent No. 5,828,583 issued to Bush, et al. ("*Bush*"). With respect to the proposed combination of *Thaweethai* and *Bush*, the Board agreed that the proposed combination was not proper. However, the Board found that *Thaweethai* anticipated all claims under 35 U.S.C. § 102. Specifically, the Board rejected Applicant's arguments and broadly interpreted the term "performance attribute" as used in the claims of the present application. For example, the Board stated that the Applicant "has not recited in any independent claim on appeal the nature of the disclosed performance attributes." *Decision*, page 5. Based upon this, the Board relied upon the predetermined modem characteristics of *Thaweethai* for the rejection.

Applicant amends each of the independent claims and respectfully submits that the independent claims, as presently amended, are patentably distinct from *Thaweethai*. For example, consider independent Claim 1, as presently amended, which recites:

1. An access server, comprising:
 - a plurality of modems;
 - a memory operable to store a performance attribute for each modem, wherein for each of the modems, the performance attribute indicates operating performance of the modem as monitored over a period of operation of the modem;
 - an allocation module coupled to the memory and operable to receive a modem request and to select a modem for service according to the modem's performance attribute; and
 - a telecommunications interface coupled to the allocation module and operable to couple a remote modem to the selected modem.

Applicant respectfully submits that *Thaweethai* fails to teach, either expressly or inherently, the performance attributes of Claim 1. In *Thaweethai*, the Examiner and the Board relate *Thaweethai*'s disclosed modem characteristics to Applicant's claimed performance attributes.

However, as *Thaweethai* repeatedly makes clear, its disclosed modem characteristics are predetermined, fixed qualities of the modems. *Thaweethai*, col. 2, ll. 44-49; col. 18, ll. 52-56; and col. 19, ll. 1-6. Predetermined characteristics are not based on actual operating performance. Moreover, *Thaweethai* does not disclose any monitoring mechanism for determining actual operating performance. Therefore, *Thaweethai* fails to teach all elements of Applicant's Claim 1. For analogous reasons, *Thaweethai* fails to teach all elements of the other independent Claims 10, 19, and 28. Applicant thus respectfully requests reconsideration of the rejection and full allowance of all claims.

CONCLUSION

Applicant has made an earnest attempt to place the Application in condition for allowance. For the foregoing reasons, and for other reasons clearly apparent, Applicant respectfully requests full allowance of all pending claims. If the Examiner feels that a telephone conference or an interview would advance prosecution of the Application in any manner, the undersigned Attorney for Applicant stand ready to conduct such a conference at the convenience of the Examiner.

No fee is believed to be due. However, the Commissioner is hereby authorized to charge any extra fees or credit any overpayments to Deposit Account No. 02-0384 of BAKER BOTTS L.L.P.

Respectfully submitted,

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